

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
April 24, 2012

v

RICHMOND DRAKEFORD COLE,  
  
Defendant-Appellant.

No. 303806  
Kent Circuit Court  
LC No. 10-006973-FH

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Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (sexual penetration during commission of a felony). The trial court sentenced defendant to 3 to 25 years' imprisonment. We affirm.

On the night of June 25, 2010, the victim was sleeping in the upstairs bedroom of her apartment when she awoke to find defendant on top of her, putting his penis in her vagina. The victim got away from defendant, got her gun from her closet, and chased defendant down the stairs and out of the apartment. When questioned by the police, defendant admitted to being in the apartment and engaging in sexual penetration with the victim, but contended that the victim let him into the apartment, invited him upstairs, and engaged in consensual sexual intercourse with him before realizing that defendant was not the individual she thought he was. Defendant stated that he told the victim that he was going to leave and was putting his clothes on when the victim pulled the gun on him.

Defendant contends that the prosecution presented insufficient evidence to support his conviction. We review claims of insufficient evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). A court reviewing the sufficiency of the evidence must view the evidence in the light most favorable to the prosecution and determine whether the evidence was sufficient to allow any rational trier of fact to find guilt beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove all the elements of an offense beyond a reasonable doubt." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

A conviction of CSC I under MCL 750.520b(1)(c) requires proof that: (1) defendant sexually penetrated the victim, (2) defendant committed the underlying felony (in this case, home invasion), and (3) "there existed a direct interrelationship between the felony and the

sexual penetration.” *People v Waltonen*, 272 Mich App 678, 693-694; 728 NW2d 881 (2006). The underlying felony must directly affect the victim of or participant in the sexual penetration. *People v Lockett*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_, 2012 WL 75310 (2012).

To establish first-degree home invasion, the prosecution must prove that (1) the defendant either broke into and entered a dwelling or entered a dwelling without permission; (2) the defendant either intended to commit a felony, larceny, or assault when entering the dwelling or committed a felony, larceny, or assault while entering, present in, or exiting the dwelling; and (3) either the defendant was armed with a dangerous weapon or another person was lawfully present in the dwelling while the defendant was entering, present in, or exiting the dwelling. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). The underlying felony, larceny, or assault for purposes of the home invasion in this case was third-degree criminal sexual conduct (CSC III), MCL 750.520d, which requires proof that the defendant engaged in sexual penetration with another person under certain aggravating circumstances. *People v Crippen*, 242 Mich App 278, 282; 617 NW2d 760 (2000). These aggravating circumstances include sexual penetration of a victim who is mentally incapable, mentally incapacitated, or physically helpless, MCL 750.520d(1)(c).

Defendant contends that first-degree home invasion was not proven because insufficient evidence was presented that he either broke into the apartment or entered the apartment without permission. We find this argument without merit. The victim testified that she locked the rear door before she went to bed, and another witness testified that it was the victim’s practice to lock all the doors whenever she entered the apartment. The victim further testified that when she left after the incident, the back door was open, and she testified that she had difficulty locking the door after the assault. Marks found on the back door and wood chips discovered on the floor near the back door were indicative of forced entry through the back door. Moreover, contrary to defendant’s testimony, the victim testified that she did not allow defendant into her apartment. Although another woman, who was living in the apartment at the time of the assault, testified that she allowed defendant into the apartment for a short time earlier in the evening, she testified that she and defendant left at the same time, that the door closed behind them when they left, and that she did not give permission for defendant to go back into the apartment later. We again note that, for the home-invasion conviction, evidence that defendant entered the home without permission would be sufficient; evidence of forced entry was not required. *Wilder*, 485 Mich at 43. When viewed in the light most favorable to the prosecution, the evidence was sufficient for a rational jury to have found that defendant entered defendant’s apartment without permission or broke into and entered the apartment.<sup>1</sup>

Defendant next argues that the home-invasion conviction was not adequately supported because there was insufficient evidence that the victim was physically helpless or that defendant

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<sup>1</sup> Defendant points out evidence favorable to him in asking this Court to find that the evidence supporting the home invasion was insufficient. This ignores the proper standard of review. *Hunter*, 466 Mich at 6.

affirmatively disguised himself. Thus, defendant argues, the prosecution did not establish the commission of CSC III. This argument is likewise without merit. MCL 750.520a(m) states that “[p]hysically helpless’ means that a person is unconscious, *asleep*, or for any other reason is physically unable to communicate unwillingness to an act” (emphasis added). The victim testified that she was asleep when she woke up to find defendant on top of her, putting his penis in her vagina. Because a sleeping person falls within the statutory definition of someone who is physically helpless, sufficient evidence was presented from which a jury could rationally find that defendant sexually penetrated the victim while she was physically helpless. We find without merit defendant’s additional arguments because they require us to evaluate the weight and credibility of conflicting witness testimony and to view the evidence in the light most favorable to defendant, which we will not do. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Hunter*, 466 Mich at 6.

Affirmed.

/s/ Patrick M. Meter

/s/ Deborah A. Servitto

/s/ Cynthia Diane Stephens